
IN THE
United States Circuit Court
of Appeals
FOR THE NINTH CIRCUIT

NORTHERN PACIFIC RAILWAY
COMPANY, a Corporation,
Plaintiff in Error,

vs.

No. 2098

TONY CURTZ, a Minor, by AGNES
CURTZ, Guardian *ad litem*,
Defendant in Error.

UPON WRIT OF ERROR FROM THE UNITED
STATES CIRCUIT COURT, FOR THE WEST-
ERN DISTRICT OF WASHINGTON,
WESTERN DIVISION.

Supplemental Brief of Defendant in Error

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It is stated in our brief that, "It is admitted that the cars were standing on Dock street." We did this because Mark Maloney, Tony Curtz, Maggie Slabb, Clark, Raymond, Edwin Wolfe say so, and they are all witnesses who testify on that point—AND NOT ONE CONTRADICTS THEM.

The evidence which Appellant in Error quotes in his brief *does not relate to the location of the cars at all. It refers solely to the location of the tracks.* It agrees with the evidence of defendant in error.

Were the cars on Dock street?

I. Mark Maloney, page 32, Record, says: "There was one track at 11th street IN Dock street, and then there were several tracks west of Dock street. * * * I saw Tony and a boy and a girl with him over under the 11th street bridge. They went up towards the cars, the string of cars ON Dock street. * * * These cars were on the track that runs *across Dock street there at the bridge.* Page 33. I got into one of the cars from the water side and I think the other got in from the water side, too.

Edwin Wolfe, p. 36: "I was down there the day Tony got hurt. I came down by the 11th street bridge and *I saw him there a little south of the bridge.* Tony was going to get into the car when I saw him."

F. L. Raymond, p. 40: "Were you there the day Tony Curtz got hurt? A. Yes. Q. Where were you at that time? A. At the time I should judge *I was about even where the switch leads off from the track on the west side of Dock street.*" His next answer quoted in appellant's brief shows he was about 75 feet south of 11th street bridge, and that there was a string of cars between him and the bridge, or on the track which leads

from the switch *across Dock street*. This is just the place where Mark Maloney put them. This witness also shows they were ON Dock street.

Raymond, p. 47: "When you came out from the dock and turned south with your sugar you saw two carts there? No, sir; I did not notice the two carts. I only noticed one little two-wheeled cart. Q. That was outside of the car? A. Outside the track, yes, sir."

Clark, witness for plaintiff in error, p. 58, of Record: "I saw the children IN the cars just a few minutes previous to the accident * * * The string of cars extended past where I was working *up to about the bridge.*"

Tony Curtz, p. 25: "The cars were this side, *that is south of the 11th street bridge, and about as far as across the street.* P. 26: The car I went into was the end car of the string of cars standing there. P. 27: The boy and girl who were with me did not get into the same car I did. *They got into some other cars on the same track.*"

Maggie Slabb, p. 28: "When we went down the steps onto the tracks, *we then went south, about the distance of across the street, from the bridge to the cars.* P. 29: I saw cars standing on the track south of the bridge. * * * We went down to where the cars were and I got up on a car* * *"

Raymond, p. 39: "The tracks between 11th street and 15th street are west of Dock street, between Dock street and the bluff, and this one track *switches off about 100 yards south of the bridge, and it angles across Dock street.*"

This last statement of witness Raymond shows

that the track runs *on* and *over* Dock street, "angles across Dock street," is the way he puts it, for 100 yards, or 300 feet.

All the witnesses who testify about the cars the children got in put them from 75 to 100 feet south of the bridge. This would bring them all on Dock street.

The evidence quoted by appellant in error does not contradict this. It nowhere refers to the SITUATION of the CARS, but entirely to the number, *location and direction* of the TRACKS.

Our statement, in our first brief, that the cars were *on* Dock street and that it is so admitted is, therefore, correct. A careful examination of all the evidence will show that at no place is this controverted.

This shows that the cars were *on a public street* and not on the *private property* of the plaintiff in error, and all our authorities cited on the question of licensee and invitee are in point. The cases would be in point even if the cars were on the railroad right of way, as license can exist there also.

The Clarke and Barney cases are not in point. They refer to boys catching onto *moving cars*, at a place where there was *no license* and where the courts say the company had no cause to anticipate their presence and the case from 134 S. W. 858 is clearly distinguishable from the case at bar.

The evidence clearly shows that the plaintiff in error knew that children and men had been habitually, continuously and openly accustomed to be in and upon the cars at this public place and especially on Saturday, and that this was Saturday and there were six or seven small children there "sweeping wheat." and the evidence further shows that the plaintiff in error *knew* that the defendant in error was there with his two little companions doing what the plaintiff in error had invited them to do, at least impliedly, by a well established custom extending over six years, and with that knowledge and acquiescence in their minds, the cars were moved with such carelessness that it is a great wonder that more were not injured—when a little bit of care on the part of any one of the three or four switchmen would have avoided all danger. The leading "turntable" case in the U. S. Courts, the Stout case, is also the leading case on license and invitation by corporations, and we cited it and we also cite the McDonald case (U. S.), 38 Lawyers' Edition, 434, and we claim that these cases and the cases cited from this Circuit control the law in favor of an affirmance of the judgment in this case.

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